

PAUL J. RIEHLE (SBN 115199)
paul.riehle@faegredrinker.com
FAEGRE DRINKER BIDDLE & REATH LLP
Four Embarcadero Center
27th Floor San Francisco, CA 94111
Telephone: (415) 591-7500
Facsimile: (415) 591-7510

CHRISTINE A. VARNEY (*pro hac vice*)
cvarney@cravath.com
KATHERINE B. FORREST (*pro hac vice*)
kforrest@cravath.com
GARY A. BORNSTEIN (*pro hac vice*)
gbornstein@cravath.com
YONATAN EVEN (*pro hac vice*)
yeven@cravath.com
LAUREN A. MOSKOWITZ (*pro hac vice*)
lmoskowitz@cravath.com
M. BRENT BYARS (*pro hac vice*)
mbyars@cravath.com

CRAVATH, SWAINE & MOORE LLP
825 Eighth Avenue
New York, New York 10019
Telephone: (212) 474-1000
Facsimile: (212) 474-3700

*Attorneys for Plaintiff and Counter-defendant
Epic Games, Inc.*

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

Case No. 4:20-cv-05640-YGR-TSH

EPIC GAMES, INC.,

Plaintiff, Counter-defendant,
v.
APPLE INC.,

Defendant, Counterclaimant.

**EPIC GAMES, INC.'S SUR-REPLY
IN RESPONSE TO APPLE INC.'S
REPLY IN SUPPORT OF ITS
MOTION TO STRIKE WRITTEN
AND ORAL TESTIMONY OF DR.
MICHAEL I. CRAGG**

The Honorable Yvonne Gonzalez Rogers

1 Epic Games, Inc. (“Epic”) respectfully requests leave to submit this sur-reply solely to
 2 address Apple’s gross mischaracterization of Dr. Cragg’s trial testimony and the Compass
 3 Lexecon report Epic has provided to the Court, per the Court’s request.¹

4 Apple asserts that Dr. Cragg misrepresented to the Court that he reviewed the exact
 5 Compass Lexecon reports excerpted in the two JFTC submissions, instead of the variant of that
 6 report, discussing the very same experiment, that Epic submitted to the Court. Not so. When
 7 asked by Apple’s counsel whether he reviewed the Compass Lexecon report excerpted in the
 8 two JFTC submissions, Dr. Cragg specifically testified that “I -- I don’t remember the exact
 9 composition. I have read a Compass Lexecon report that, for instance, [REDACTED]
 10 [REDACTED] Trial Tr. 2339:16-20 (emphasis added). Counsel for Apple then asked Dr.
 11 Cragg whether he had the complete report “referred to here”, without specifying whether he
 12 meant the report referred to in the document, or the one Prof. Cragg had “referred to” in the
 13 preceding question, to which Dr. Cragg replied “yes”. Later, when asked by the Court whether
 14 he believed the truth of the numbers contained in the Spotify JFTC submissions, Dr. Cragg
 15 again answered “there’s a report from Compass Lexecon” that he reviewed that describes the
 16 same experiment described in the JFTC submissions. Trial Tr. 2344:8-14 (emphasis added).

17 This testimony was all accurate and truthful, and Apple’s attack on Dr. Cragg is
 18 misleading in the extreme. Epic previously provided a copy of the Compass Lexecon report
 19 that Dr. Cragg discussed to the Court and is providing another copy with this sur-reply. (Even
 20 Decl. Ex. A.) That report describes a December 2018 experiment that is the same as that
 21 described in Spotify’s two JFTC submissions. [REDACTED]
 22 [REDACTED]
 23 [REDACTED] (Even Decl. Ex. A at 9.) [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

26
 27 ¹ Epic disagrees with various other factual assertions and arguments presented in Apple
 28 Inc.’s (“Apple”) reply in support of its motion to strike portions of Dr. Cragg’s testimony and
 the supporting declaration, but does not believe these disagreements require a sur-reply.

1 [REDACTED]. (*Id.*; PX-1152 at 2; PX-1153 at 2.) The
2 report is exactly as Dr. Cragg described it, and supports his opinions for the reasons he testified
3 to.

4 For these reasons, as well as those laid out in Epic's initial opposition, Apple's motion
5 to strike should be denied.

Dated: May 18, 2021

CRAVATH, SWAINE & MOORE LLP

Christine Varney (*pro hac vice*)
Katherine B. Forrest (*pro hac vice*)
Gary A. Bornstein (*pro hac vice*)
Yonatan Even (*pro hac vice*)
Lauren A. Moskowitz (*pro hac vice*)
M. Brent Byars (*pro hac vice*)

FAEGRE DRINKER BIDDLE & REATH LLP

Paul J. Riehle

Respectfully submitted,

By: /s/ Yonatan Even
Yonatan Even

*Attorneys for Plaintiff and Counter-defendant
Epic Games, Inc.*